IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-

CHARLES F. REHOR,
Petitioner,

v.

CASE WESTERN RESERVE UNIVERSITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

RICHARD M. BEETSCH
430 Leader Building
Cleveland, Ohio 44114

Attorney for Petitioner

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The petitioner, Charles F. Rehor, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered on July 23, 1975, which reversed the judgment of the Court of Appeals for the Eighth Appellate District of Ohio and which reinstated the judgment of the Court of Common Pleas of Cuyahoga County, Ohio.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio of July 23, 1975, is set forth as Section A of the appendix attached hereto. The opinion of the Court of Appeals for the Eighth Appellate District of Ohio of July 25, 1974, is set forth as Section B of the appendix attached hereto. The Findings of Fact and Conclusions of Law of the Court of Common Pleas of Cuyahoga County, Ohio of December 21, 1973, is set forth as Section C of the appendix attached hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was entered on July 23, 1975. This petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

I. Whether or not Charles F. Rehor, the petitioner, was denied his federally protected rights to equal protection of the laws, to the privileges and immunities inherent in his citizenship, and/or to retain his valuable property rights unless they are removed through due process of law, by virtue of the manner in which the Supreme Court of Ohio ruled upon a cause of action

which the petitioner had pursued through the Ohio Judicial System.

II. Whether or not the State of Ohio, through its Judicial System, constitutionally impaired the obligations of a contract between the petitioner and the respondent.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of Section 10 of Article I and of Section 2 of Article IV and of the Fifth Amendment and of the Fourteenth Amendment of the Constitution of the United States are set forth as Section D of the appendix attached hereto.

STATEMENT OF THE CASE

To quote the opinion of Justice Celebrezze of the Supreme Court of Ohio, written in dissent from the majority opinion, this is a case in which, "Unfortunately, Professor Rehor (petitioner) with equity and long service on the side, is rejected in the creation of the cause celebre."

The petitioner was a tenured member of the respondent's faculty. At the time the petitioner was granted tenure, there was in existence a faculty handbook which stated that, "It is provided, however, that the services of all members of all Faculties shall automatically terminate on June thirtieth following the date upon which

they reach the age of seventy years, or upon their seventieth birthday if that falls on June thirtieth, excepting that, in conformity with action heretofore had by the Faculty of the School of Medicine, the age of retirement of members of the teaching staff of the School of Medicine appointed on or after October 10, 1945, shall be 65 years." This handbook (relevant excerpts from which are set forth in full as Section E of the appendix attached hereto) also contains the following provisions regarding termination, "(a) A trustee appointed member of a Faculty (excluding clinical appointees) with tenure, except in cases of extraordinary circumstances because of financial exigencies, shall not be removed save for cause."

Subsequently, the university unilaterally changed the provisions relating to the retirement age of faculty members. Thereafter, the petitioner was involuntarily retired under the terms of the retirement provisions which the respondent had unilaterally enacted. The respondent had no grounds for dismissing the petitioner other than this newly enacted retirement policy. No reasonable means was provided to the plaintiff by which he could seek or obtain any relief from the decision of the respondent to involuntarily retire him. Nor did he accept or receive any adequate compensation for the damages which he suffered

as a result of the respondent's action.

The petitioner originally sought redress by filing suit in the Court of Common Pleas for Cuyahoga County, Ohio, alleging that the terms of his contract had been breached by the actions of the University. The trial court found against the petitioner and determined that no breach of contract had occurred and that the petitioner had received adequate consideration for this change in the retirement provision.

The petitioner appealed the trial court's decision to the Eighth District Court of Appeals for the State of Ohio. The three-judge panel deciding that appeal unanimously reversed the decision of the trial court and remanded the case to the trial court for a determination of damages. The respondent then petitioned the Supreme Court of Ohio to review the decision of the Court of Appeals. The Supreme Court accepted the case and subsequently rendered a six to one decision against the petitioner and in favor of the respondent and reinstated the judgment of the trial court.

Although this suit clearly started out as an attempt on the part of the petitioner to obtain personal redress for a personal wrong, the objectives and interest of the petitioner became obscured after the Court of Appeals' opinion was directed to the attention of universities in Ohio

and elsewhere. The Court of Appeals' opinion became viewed as a precedent which would paralize the universities' ability to effect any type of change in its practices and procedures. As a result, numerous letters were directed to the Supreme Court of Ohio by persons connected with universities and education associations requesting that the court accept the case for review. Some such letters are gathered under Section F of the appendix attached hereto.

After the Supreme Court of Ohio agreed to hear the case, a brief was filed on behalf of virtually all of the State Universities of Ohio and another on behalf of the trustees of Boston University. That these schools took such an interest in this case appeared to significantly impress the Supreme Court of Ohio. Indeed, before commencing an explanation of its decision, the Supreme Court opinion recites that, "This court has the advantage of oral argument and carefully prepared briefs by counsel for the parties and in addition, briefs amici curiae from the American Association of University Professors in support of the plaintiff; from the Attorney General of Ohio in support of the position of the defendant on behalf of Bowling Green State University, Central State University, Cleveland State University, Kent State University, Medical College of Ohio at Toledo, Ohio

University, University of Toledo, and Youngstown State University; and, from the trustees of Boston University in support of defendant's position."

MANNER IN WHICH FEDERAL QUESTIONS WERE PRESENTED

The pronouncement of the Supreme Court of the United States regarding the significance of tenure was first brought into this case by a supplemental trial brief filed by the plaintiff at the conclusion of the trial. In that trial brief, the court's attention was directed to Perry v. Sindermann, 408 U.S. 547 (1972). However, this case really came to the fore when the Court of Appeals' opinion fixed upon it as a key factor in its decision. The Court clearly relied upon Perry for its view that the petitioner had acquired a protected interest in his tenured position with the respondent.

The court not only commenced its opinion with a citation to Perry but also concluded its opinion with the statement that "...Dr. Rehor was involuntarily retired two years prior to the express provision of his employment contract and has been denied a property right in the form of a justified, objective expenctancy of continuous employment to age 70."

That the Supreme Court of Ohio appreciated

the Court of Appeals' reliance upon Perry, understood it, and knowingly rejected it, is manifested by the following statement from the Supreme Court opinion:

> The latter qualification of plaintiff brings to the front and center paragraph one of the syllabus of the Court of Appeals' decision, which reads as follows:
>
> "An award of academic tenure vests a university faculty member with the right to continued reappointment to the faculty unless sufficient cause is shown for his termination."
>
> We do not agree with that conclusion of the Court of Appeals.
>
> Academic tenure does not, in the manner expressed, vest a faculty member with the right to continued reappointment to the faculty, and we so hold. A vested right is a right fixed, settled, absolute, and not contingent upon anything. Such is not the case here."

The second federal question was raised by the Court of Appeals' opinion by virtue of the Court of Appeals' citation to and reliance upon Indiana, ex rel. Anderson v. Brand, 303 U.S. 95 (1938). This case manifests another instance in which the Supreme Court of the United States viewed tenure as a means by which an individual could acquire a vested right to continued employment. For that reason, the State of Indiana was held to be unable to divest the tenured teacher's

right by enacting a statute which impaired the obligation of the State to honor the teacher's vested right. Thus, the Supreme Court of Ohio was well aware of the U.S. Supreme Court's position concerning action by a state to impair such obligations.

REASONS FOR GRANTING THE WRIT

Sec. I

While Professor Rehor would have been and should have been content to have his case litigated on the merits of his particular contractual claim against the defendant as that claim should be resolved in view of pre-existing Ohio and Federal precedents, it is clear that his case was not decided in that manner but rather was decided as a reaction to the alarm manifested by the university lobby.

While the Court of Appeals' opinion is replete with citations which support its contentions, the entire opinion of the Supreme Court of Ohio is devoid of any citation to any precedent upon which it relied for any of its conclusions. This manifested its desire to achieve its result no matter what the law may be and in spite of what the law may be.

The court's opinion further manifested a lack of appropriate concern for the facts of the case. The petitioner included in the record

before the Ohio Supreme Court his extensive testimony manifesting an unswerving course of resistance to and rejection of the respondent's desire to retire him two years early. This course consisted of oral and written pleas to various members of the faculty and administration and a constant search for some logical established university procedure for presenting his position, which search was never successful because there was no such procedure. In spite of this clear manifestation of the total opposition demonstrated by Professor Rehor from the outset, the Supreme Court of Ohio stated that: "And no objection to the policy was ever raised by the American Association of University Professors, the plaintiff or any faculty member after its adoption on April 16, 1969, until the spring of 1973." In view of the result which the Supreme Court wanted to achieve, its only course was to reject this court's position of the significance of tenure. If tenure was determined not to be the valuable property right which the United States Supreme Court says it is, then there is no validity to a claim by Professor Rehor that the right was not adequately protected.
As a further hedge against any due process or equal protection argument, the court simply ignored the evidence relating to that issue and concluded that the process used was not only all right but

had been completely accepted by all concerned. Such manifest rejections of federal precedent and clear and convincing evidence demonstrate a conscious effort to evade the federal rights of the petitioner by simply ignoring the law and the facts.

Another manifestation of the court's desire to decide this case with less than perfect objectivity is the court's acceptance of the highly tenuous contention that the plaintiff's $500.00 salary increase was the adequate consideration for the alleged abandonment by the plaintiff of his full contractual rights. Indeed the whole injection of contention that the contract between the respondent and the petitioner was appropriately amended appears to be an attempt by the court to touch all bases just in case its totally unprecedented position on the meaning of tenure failed to convince anyone of the appropriateness of its ruling.

Sec. II

That the contract in Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938) was unconstitutionally impaired by the action of the State of Indiana was manifestly clear. The only distinction between the effort on the part of Indiana to avoid its contractual obligations by amending

its statutes and the effort on the part of the respondent to avoid its obligations by amending its regulations, is a distinction as to the branch of the government involved. In the Brand case, the state acted improperly through its legislature. In this case, the state acted improperly through its judicial system. In Shelley v. Kraemer, 334 U.S. 1, (1948), this Court pointed out: "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."

In this case, as in Shelley, it was the unconstitutional action of the state court that enabled one private citizen to effectively deny a federally protected right to another private citizen. Were it not for the Ohio Supreme Court's sanction of the respondent's breach of contract, the petitioner would have been afforded his rights in the proceedings which he untertook for that purpose. However, the unprecedented and unexpected position which the Ohio Supreme Court adopted effectively eliminated the petitioner's right to receive the benefits of his contract and forced him to seek relief from this Court.

Sec. III

The above two arguments were directed to the question of whether or not this case was decided in accordance with the applicable decisions of this court. They demonstrate that it has not been so decided. But in addition, the Court is urged to recognize that this is a decision which has a significance considerably beyond the personal problems of Professor Rehor. We have earlier mentioned our belief that the Supreme Court of Ohio decided this case as it did in deference to the pressures exerted by the universities which had aligned themselves with the respondent in urging that the Supreme Court of Ohio reverse the Appellate Court. This decision was, no doubt, warmly received by not only the administrators of the various colleges who actually appeared in this suit, but also the administrators of every other institute of higher learning which is searching for some means of impairing the obligations of its contracts with its tenured faculty. That schools throughout this country are experiencing difficulties from decreasing enrollment and increasing expenses is a well-known fact. And, even though financial exigency is a grounds for terminating a tenured faculty member, the device promoted by the Supreme Court of Ohio (contrary to the position of this Court)

of declaring that a grant of tenure does not carry with it any vested right to continuous employment, provides a means of dealing with tenured faculty in a much more convenient manner. The impairment of Professor Rehor's contract and the denial of his rights to due process, to equal protection of the laws, and to the privileges and immunities of a citizen of this country, will, if the Ohio Supreme Court's precedent is allowed to stand, be repeated against other tenured faculty members (and probably against other persons who may hold judicial or some other type of tenure) not only in Ohio but also in other states which may be induced by similar special interest groups to adopt a similar position.

CONCLUSION

This case presents an instance in which there not only has been an injustice but in which there is also a precedent which can lead to future injustices. This is the result of the failure of the Supreme Court of Chio to act constitutionally and to act with respect for the federally protected rights of the petitioner. This case was decided as an accomodation to the special interest group which rallied to the respondent's cause. This Court has established a firm tradition of requiring special interest groups to solve

their problems, however real and significant their problems may be, without resorting to ignoring and denying the constitutional rights of individuals. This Court has never been reluctant in the past to act quickly and effectively to prevent the state governments from siding with special interest groups to the detriment of individuals.

WHEREFORE, the petitioner respectfully prays that this Court grant this writ and review this case for the sake of restoring the petitioner's federally protected rights and prohibiting unconstitutional state action.

Respectfully submitted,

RICHARD M. BERTSCH
440 Leader Building
Cleveland, Ohio 44114
(216) 696-1433

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 1975, a copy of the within Petition for Writ of Certiorari was mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

James I. Huston
Thomas J. LaFond
Schneider, Smeltz, Huston & Bissell
1525 National City Bank Building
Cleveland, Ohio 44114

RICHARD M. BERTSCH
440 Leader Building
Cleveland, Ohio 44114
(216) 696-1433

Attorney for Petitioner

APPENDIX

Statement of the Case.

REHOR, APPELLEE, *v.* CASE WESTERN RESERVE UNIVERSITY, APPELLANT.

[Cite as Rehor v. Case Western Reserve University (1975), 43 Ohio St. 2d 224.]

Contracts—Faculty of private university—Employment—Tenure—Conditions of retirement — University rules and regulations—University may change retirement age, when—Employment contract may be amended, when.

1. Where a university faculty member is employed, using standard annual reappointment forms which do not set forth in full the terms and conditions of employment, the university's employment policies, rules and regulations become part of the employment contract between the university and the faculty member.
2. The grant of tenure to a faculty member by a university does not preclude the university from thereafter changing the retirement age for all faculty members, including the tenured faculty member, provided the change is reasonable and uniformly applicable.
3. A bylaw of a university, to the effect that its board of trustees shall from time to time adopt such rules and regulations governing the appointment and tenure of the faculty as the board deems necessary, includes a reservation of the right to change the university's retirement age.
4. An employment contract between a tenured faculty member and a university may be amended by the parties in writing when supported by adequate consideration.

(No. 74-899—Decided July 23, 1975.)

APPEAL from the Court of Appeals for Cuyahoga County.

Plaintiff, Charles F. Rehor, was a tenured professor of English at Case Western Reserve University in Cleve-

land, which institution of higher learning is the defendant in this lawsuit.

Plaintiff commenced employment at Cleveland College in 1929, teaching primarily in the fields of English and Journalism. Cleveland College became a part of Western Reserve University in 1942. From 1942 through June 30, 1967, plaintiff was employed under contract as a professor at Western Reserve University. Plaintiff was granted tenure by Western Reserve University prior to 1948. At all times during which plaintiff was a faculty member there the retirement age was 70 years.

In July 1967, a federation of Case Institute of Technology and Western Reserve University took place and was organized under the laws of Ohio as a corporation not for profit, known as Case Western Reserve University. Plaintiff continued under contract as a professor at defendant university from July 1, 1967, to his retirement on June 30, 1973.

Defendant assumed the employment contracts between former Western Reserve University and its faculty members, including plaintiff. After the federation, defendant began a review of the separate policies, rules and regulations of the two former institutions and the adoption of uniform policies, rules and regulations for defendant, its faculty, students and administration.

Two faculty committees of defendant reviewed the separate retirement policies of the two former institutions and recommended a uniform retirement policy. Case had a retirement age of 65 and Western Reserve's was 70. Notices of the activities of these committees were given to faculty members, and at least one public hearing for faculty members was held.

On April 16, 1969, defendant's Board of Trustees, duly acting through its executive committee, adopted a resolution amending defendant's faculty retirement policy, specifically as outlined and recommended by the *ad hoc* University Committee on Faculty Retirement in a memorandum to President Robert W. Morse, dated January 15, 1968.

The amended retirement policy provided that retirement of all faculty members was to be at age 65, subject to the following conditions: (a) Contributions by the university to its retirement pension program would cease at age 65; (b) upon reaching the designated age of 65, the faculty member would have the option of continued employment either full time or part time to age 68; (c) between the ages of 68 and 70 the faculty member could petition to be reappointed on a part-time or full-time basis, and, upon recommendation of the appropriate university committees, could be reappointed for a one-year or two-year period; and (d) reappointments on an annual basis only could be continued beyond age 70, these to be initiated only by the university committees.

This amended retirement policy was communicated to all faculty members, including plaintiff, in writing on April 6, 1970. Plaintiff was specifically advised in writing by defendant on June 2, 1970, that the date of his retirement would be June 30, 1973. On July 2, 1969, plaintiff executed an annual reappointment form for the academic year, July 1, 1969, to June 30, 1970. On July 6, 1970, plaintiff executed a reappointment form for the academic year, 1970-1971. On May 6, 1971, plaintiff executed a reappointment form for the academic year, 1971-1972. On May 17, 1972, plaintiff executed a reappointment form for the academic year, 1972-1973, noting his objection to the retirement date of June 30, 1973. Each of these annual reappointment forms, signed by plaintiff after the adoption of defendant's amended retirement policy, provided for an increase of salary to plaintiff over the prior year.

Plaintiff was 68 years of age on September 5, 1972, and was retired as of June 30, 1973, in accordance with defendant's amended retirement policy. Pursuant to the terms of the amended retirement policy, plaintiff petitioned the appropriate faculty committee for a recommendation that he be reappointed beyond age 68. After committee consideration, no action was taken on that petition. Plaintiff also petitioned the president of defendant university by letter, dated July 19, 1971, for reappointment beyond age

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68; this request was refused by the president in writing on September 22, 1971.

On April 27, 1973, plaintiff filed a complaint in the Court of Common Pleas of Cuyahoga County, praying for a judgment, declaring that he is entitled to remain in the employ of defendant until the age of 70, unless discharged for cause, for injunctive relief, for compensatory damages in the amount of $50,000, and for exemplary damages in the amount of $100,000, together with reasonable attorney fees.

Issues were joined by answer containing denials and setting up two affirmative defenses.

The cause was tried to the court on July 26 and 27, 1973, the parties having previously waived their right to trial by jury. The trial court found in favor of defendant and entered judgment for the university and against plaintiff. The trial court made separate findings of fact and conclusions of law at plaintiff's request.

Upon appeal, the Court of Appeals reversed the judgment of the Court of Common Pleas, entered final judgment for plaintiff, and remanded the cause to the Court of Common Pleas for further proceedings on the computation of damages.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Messrs. Bertsch, Edelman & Fludine, Mr. Richard M. Bertsch and *Mr. Thomas J. Dorchak*, for appellee.

Messrs. Schneider, Smeltz, Huston & Bissell, Mr. James I. Huston and *Mr. Thomas J. LaFond*, for appellant.

CORRIGAN, J. Fundamentally, this is an employment contract case. It is concerned with the period of employee's term of employment.

However, the lawsuit more importantly involves an interpretation of "tenure,"[1] as that term is used in em-

[1]The 1940 Statement of Principles by the American Association of University Professors reads, in part:

"Academic Tenure

ployment contracts of professors with colleges and universities. But, with more particularity, the cause also involves the retirement of a tenured professor because of age.

This court has the advantage of oral argument and carefully prepared briefs by counsel for the parties, and, in addition, briefs *amici curiae* from the American Association of University Professors, in support of plaintiff; from the Attorney General of Ohio, in support of position of defendant on behalf of Bowling Green State University, Central State University, Cleveland State University, Kent State University, Medical College of Ohio at Toledo, Ohio University, University of Toledo, and Youngstown State University; and, from the trustees of Boston University in support of defendant's position.

This is a case of first impression in Ohio.

Defendant urges the reversal of the judgment of the Court of Appeals, and poses four propositions of law in support of its position. Each will be considered in the order presented.

I.

Defendant contends that, where a university faculty member is employed, using standard annual reappointment forms which do not set forth in full the terms and conditions of employment, the university's employment policies, rules and regulations become part of the employment contract between the university and the faculty member.

Plaintiff admits in his brief that: "There has been universal acceptance of this proposition by both the parties and the courts below insofar as it holds that the full con-

"(a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies."

tract between the plaintiff and defendant contains the various rules and regulations and policies of the university • • •." Plaintiff, later in his brief, states: "As far as defendant's Proposition of Law No. 1 is concerned, the plaintiff simply restates that he agrees with it as long as it is deemed to include the possibility of such a contract conferring vested rights to future benefits upon the parties to it."

The latter qualification of plaintiff brings to the front and center paragraph one of the syllabus of the Court of Appeals' decision, which reads as follows:

"An award of academic tenure vests a university faculty member with the right to continued reappointment to the faculty unless sufficient cause is shown for his termination."

We do not agree with that conclusion of the Court of Appeals.

Academic tenure does not, in the manner expressed, vest a faculty member with the right to continued reappointment to the faculty, and we so hold. A vested right is a right fixed, settled, absolute, and not contingent upon anything. Such is not the case here.

The only signed documents evidencing the employment agreement between Professor Rehor and Case Western Reserve University are the annual reappointment forms, which appear as exhibits in the record. There are also 12 annual reappointment contracts in the record between Professor Rehor and former Western Reserve University. The annual reappointment forms do not state the components of tenure or of retirement. Likewise, they do not state faculty fringe benefits, perquisites of faculty appointment, or faculty standards. All of these matters are established by various policies, rules and regulations adopted by defendant and promulgated to its faculty.

It is agreed by plaintiff and defendant that a university's policies, rules and regulations relating to faculty members become a part of the employment contract as a matter of law. The trial court properly adhered to that

principle. The Court of Appeals also agreed[1] but, oddly, did not follow it in its decision.

Accordingly, we agree with defendant's first proposition of law and hold that the retirement policy of defendant established in its policies, rules and regulations—which includes the amended retirement policy adopted April 16, 1969—was part of the annual employment agreements between plaintiff and defendant after July 1, 1967.

II.

Defendant urges, as its second proposition of law, that a university's grant of tenure to a faculty member does not preclude the university from thereafter changing the retirement age for all faculty members including the tenured faculty member, provided the change is reasonable and uniformly applicable.

Here, it is stipulated that Professor Rehor had academic tenure. The purpose of academic tenure, as used in the academic community, is the preservation of academic freedom and the correlative protection of economic security for teachers. It insures that a professor will not lose his

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[1]In its opinion, the Court of Appeals stated:

"The terms of Dr. Rehor's contract with C. W. R. U. and Western Reserve were not contained in any single instrument. Instead, C. W. R. U. used the common practice of tendering annual reappointment forms which contained certain terms of Dr. Rehor's employment contract such as salary, rank, and tenure status, and the parties have admitted further that the rules, regulations, and policies of the university, as contained in the 1964 Western Reserve Faculty Handbook, were also part of appellant's contract with appellee. There is extensive authority in accord with the proposition that university rules, regulations, bylaws, and policies become implied terms of faculty employment contracts and thereby give rise to protectable rights. See *Perry* v. *Sindermann*, *supra* [(1972), 408 U. S. 593], at 601-602; *Zimmerer* v. *Spencer* (5th Cir., 1973), 485 F. 2d 176, 178; *Greene* v. *Howard University* (D. C. Cir., 1969), 412 F. 2d 1128, 1135; *Downs* v. *Conway School Dist.* (E. D. Ark., 1971), 328 F. Supp. 338, 348-349; *Zimmerman* v. *Minot State College* (N. D. 1972), 198 N. W. 2d 108, 114; *Hillis* v. *Meister* (1971), 82 N. M. 474, 483 P. 2d 1314; see also C. Byse & L. Joughin, *supra* [Tenure in American Higher Education], at 82-84."

job for exercising academic freedom, namely, his rights to teach, to think and to speak in accordance with his conscience in the traditions of the academic community. In the establishment of tenure, the former Western Reserve University provided, in its 1964 Faculty Handbook:

"A faculty member shall have academic freedom and tenure in accordance with the current statement of principles as approved jointly by the American Association of University Professors and the Association of American Colleges." (See fn. 1.)

In a supplemental statement to its 1940 Statement of Principles on Academic Freedom and Tenure, the American Association of University Professors, in 1950, issued its "Statement of Principles on Academic Retirement and Insurance Plans," which was reaffirmed in 1969. Paragraph 9 of that statement reads:

"When a new retirement policy or annuity plan is initiated or an old one changed, reasonable transition provisions, either by special financial arrangements or by the gradual inauguration of the new plan, should be made for those who would otherwise be adversely affected."

And, paragraph 1d. of that some statement recommends that the retirement policy of a university should:

"Be reviewed periodically by faculty and administration of the institution, with appropriate recommendations to the institution's governing board, to assure that the plans continue to meet the needs, resources, and objectives of the institution and the faculty."

So, paragraph 9 of the policy statement on retirement demonstrates the understanding of the academic community that the retirement policy of a university can be changed, and paragraph 1d. points out that a retirement policy should be changed if needed.

This change in Case Western Reserve University's amended retirement policy was made upon the recommendation of its faculty, after study and open hearings; the amended retirement policy had a grandfather provision. When its retirement policy was amended, it also amended

its pension plan to provide increased university contributions to Professor Rehor's retirement plan account. Professor Rehor's retirement age of 68, under the amended retirement policy, was well within the American Association of University Professors' suggested range of retirement ages from 65 to 70. Rehor's salary was increased annually in each year of his employment under Case Western Reserve University from September 1969 to June 1973. A representative of the association was an *ex officio* member of the committee that recommended the amended retirement policy. All the above facts indicate the reasonableness of the policy. Its uniform application is obvious. And no objection to the policy was ever raised by the American Association of University Professors, the plaintiff or any other faculty member after its adoption on April 16, 1969, until the spring of 1973.

We approve defendant's proposition of law No. 2, and reject the conclusion of law reached by the Court of Appeals, as stated in paragraph three of its syllabus, that:

"Where a faculty member is awarded tenure by a university and the faculty bylaws of the university at that time state that the mandatory retirement age for faculty is 70 years, such provision in the faculty bylaws becomes a binding term of the faculty member's employment contract with the university, the faculty member has a vested right to be reappointed to the faculty to age 70, and the university cannot thereafter lower the faculty member's mandatory retirement age without abridging the employment contract."

III.

Defendant, in his proposition of law No. 3, asserts that a university's bylaw, stating that the board of trustees shall from time to time adopt such rules and regulations governing the appointment and tenure of the members of the faculty as the board of trustees deems necessary, includes a reservation of the right to change the retirement age of the faculty.

The right of defendant to change its retirement policy

appears in Article VI of the bylaws of Western Reserve University's Board of Trustees, which provides:

"The Board of Trustees shall from time to time adopt such rules and regulations governing the appointment and tenure of members of the several faculties as said board deems necessary."

The Court of Appeals allowed that Article VI was a reservation of right, but considerd it as a power over appointment and tenure generally and viewed the statement of retirement policy set forth in the 1964 Faculty Handbook[*] as an express provision. Then, citing *Freeland* v. *Freeland* (C. A. 6, 1940), 110 F. 2d 966, the Court of Appeals held that the express provision of the contract controlled the general provision so that defendant's reserved right in Article VI did not apply to the retirement policy set out in the 1964 Faculty Handbook.

As we view these two clauses, we are of the opinion that each is an express clause and the reserved right to change applies to all aspects of tenure, including retirement.

Either the retirement policy set forth in Section IV of the university's Statement of Principles for Appointment, Tenure and Separation for the Guidance of Faculties is part of and protected by tenure, or it is not; and, if the retirement policy is a part of tenure, and we hold that it is, then the reserved right to change rules of tenure includes the right to change the retirement policy.

We accept and approve defendant's third proposition of law.

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[*]Section IV of the Statement of Principles for Appointment, Tenure and Separation for the Guidance of the Faculties reads:

"It is provided, however, that the services of all members of all Faculties shall automatically terminate on June thirtieth following the date upon which they reach the age of seventy years, or upon their seventieth birthday if that falls on June 30, excepting that, in conformity with action heretofore had by the Faculty of the School of Medicine, the age of retirement of members of the teaching staff of the School of Medicine appointed on or after October 10, 1945, shall be sixty-five years."

IV.

The fourth proposition of law advanced by defendant is to the effect that an employment contract between a university and a tenured faculty member may be amended by the parties in writing when supported by adequate consideration.

Defendant amended its retirement policy in 1969. This changed plaintiff's retirement age from 70 to 68 years with a right in plaintiff to be appointed beyond age 68 upon recommendation of a faculty committee. On July 6, 1970, after having been advised of the amended retirement policy and its specific application to him, plaintiff signed his 1970-1971 annual reappointment form, which gave him a $500 salary increase. On May 6, 1971, plaintiff signed his 1971-1972 reappointment form, which also specified a $500 salary increase. Then, on May 17, 1972, plaintiff executed a 1972-1973 reappointment form which provided that it was a "[t]erminal appointment, with retirement on June 30, 1973," and it carried another $500 salary increase.

Thus, there was demonstrated adequate consideration for the amendment of the employment contract by the change in the retirement policy of the university.

CONCLUSION.

The trial court correctly concluded that the contract between the parties permitted defendant to change its retirement policy; further, that plaintiff had consented to that change and that there was not a breach of contract.

For the reasons stated above, the judgment of the Court of Appeals is reversed, and the judgment of the Court of Common Pleas is reinstated.

Judgment reversed.

HERBERT, STERN, W. BROWN and P. BROWN, JJ., concur.

O'NEILL, C. J., concurs in paragraphs one, two and three of the syllabus and in the judgment.

CELEBREZZE, J., dissents.

Dissenting Opinion, per CELEBREZZE, J.

CELEBREZZE, J., dissenting. While I can accept many of the general statements of the majority as correct statements of legal theory, when that theory is brought into contact with the specific facts of *this* case, I am unable to concur in the result.

The Court of Appeals made a simple case, which should have been decided on narrow equitable and contractual grounds, into a broad statement capable of affecting university-instructor relationships in many areas. The arguments before us were couched in the same far-reaching language.

The majority of this court has chosen to treat the issues in this case in the same vein. Unfortunately, Professor Rehor, with equity and long service on his side, is rejected in the creation of the *cause celebre*.

Professor Charles F. Rehor, until he was 64 or 65 years old, had a reasonable expectation that he would work at his chosen profession until he reached the age of 70. From the record, we find that Professor Rehor's salary was $10,000 for the school year September 1966 to June 1967; $10,500 for September 1967 to June 1968; $12,500 for September 1968 to June 1969; $13,300 for September 1969 to June 1970; $13,800 for September 1970 to June 1971; $14,300 for September 1971 to June 1972; and $14,800 for September 1972 to June 1973. Although Professor Rehor received a raise in each of the years from 1963 to 1973, the majority says that the $500 raises given in the last three years were adequate consideration for the change in his retirement date.

I find no evidence in the record that Professor Rehor accepted the modification in the term of his employment in return for the three $500 increments. Of course, the mere fact that the University offered the salary increments does not show that they were offered explicitly for that reason. Without an agreement supported by sufficient consideration there can be no effective modification. This is not to say that the University could not change the retirement age; only that those adversely affected must be compensated. Here there is no showing of an agreement, and the adequacy of the consideration is certainly in doubt.

Dissenting Opinion, per CELEBREZZE, J.

The majority relies upon portions of the Statements of the American Association of University Professors. These Statements provide suggested limitations on the admitted power of the University to change its retirement policy; and the University explicitly adheres to those Statements. The majority accepts the University's argument that changes in retirement policy need only be reasonable and uniformly applicable. However, the 1950 Statement of Principles on Academic Retirement and Insurance Plans makes clear that:

"When a new retirement policy or annuity plan is initiated or an old one changed, reasonable transition provisions either by special financial arrangements or by the gradual inauguration of the new plan, should be made for those who would otherwise be adversely affected."

Thus, the American Association of University Professors suggests that something akin to a "grandfather clause" is necessary for those faculty members adversely affected.

The University argues that these Statements provide the common "understanding of the academic community." It further argues that since the University contribution to the pension plan was increased so that no loss in pension occurred, it had sufficiently complied.

However, those arguments ignore the fact that Professor Rehor was relying on the salary he would receive in the last two years of his long career. A comparison of his probable salary and the pension to which he is entitled points out in stark fashion the extent of his deprivation. According to a letter sent by Professor Rehor to the president of the University, his pension in 1975 would be $4,755. His average salary over the period 1966 to 1973 was $12,700. There can be no better evidence of the University's failure to provide *reasonable* transition provisions for Professor Rehor.

For the foregoing reasons, I respectfully dissent.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1975 TERM

To wit: July 23, 1975

Charles F. Rehor,

Appellee,

No. 74-899

APPEAL FROM THE COURT OF APPEALS

vs.

FOR CUYAHOGA COUNTY

Case Western Reserve University,

Appellant.

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein; and, the judgment of the Common Pleas Court is reinstated.

It is ordered and adjudged also that appellant recover from appellee its costs expended in this Court; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this

___ day of _____ 19___

_____ Clerk

_____ Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, City of Columbus. — 1975 Term — To wit: July 23, 1975

Charles F. Rehor, Appellee, — No. 74-899 — MANDATE

vs.

Case Western Reserve University, Appellant.

To the Honorable Common Pleas Court

Within and for the County of Cuyahoga, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals reversed and that of the Common Pleas Court is reinstated, for the reasons set forth in the opinion rendered herein.

Thomas L. Startzman,
Clerk

_____ 19___

_____

_____ Deputy

APPENDIX

IN THE COURT OF APPEALS OF OHIO

EIGHTH DISTRICT CUYAHOGA COUNTY

NO. 33395

CHARLES F. REHOR

Plaintiff appellant OPINION

-vs- Dated: Jul 25 1974

CASE WESTERN RESERVE UNIVERSITY

Defendant appellee

APPEARANCES:

For plaintiff appellant: Richard M. Bertsch

For defendant appellee: Schneider, Smeltz, Houston & Bissel

SYLLABUS

1. An award of academic tenure vests a university faculty member with the right to continued reappointment to the faculty unless sufficient cause is shown for his termination.

2. Where a university faculty member is employed using standard annual reappointment forms that do not set forth the terms and conditions of the faculty member's employment, the faculty bylaws become part of the faculty member's contract with the university.

3. Where a faculty member is awarded tenure by a university and the faculty bylaws of the university at that time state that the mandatory retirement age for faculty is 70 years, such provision in the faculty bylaws becomes a binding term of the faculty member's employment contract with the university, the faculty member has a vested right to be reappointed to the faculty to age 70, and the university cannot thereafter lower the faculty member's mandatory retirement age without abridging the employment contract.

4. Where a university offers a tenured faculty member continued reappointment to an expressly stated mandatory retirement age of 70 and the faculty member continues to teach in reliance on that offer, the offer becomes irrevocable and a binding term of a unilateral contract, representing the duration of the promised employment.

5. An express contract provision that the mandatory retirement age for faculty is 70 years is binding and controlling over a general contract provision in which the employer-university reserved rule-making power over appointments and tenure and purportedly the power to lower the mandatory retirement age for faculty unilaterally.

SILBERT, C.J.:

The facts in this case are not in dispute. Charles F. Rehor, Ph.D., the plaintiff appellant, was employed by Case Western Reserve University [C.W.R.U.], the defendant appellee, and by two of its direct predecessor-constituent institutions, Cleveland College and Western Reserve University, by annual reappointment to the faculty, from 1929 until June 30, 1973. Dr. Rehor had been named a full professor of English and Journalism and granted tenure prior to 1948. On July 1, 1967, Western Reserve and Case Institute of Technology federated as one corporate entity under the conglomerate name of Case Western Reserve University. The retirement age for Case Institute faculty was 65 years. The issue in this litigation arose from the fact that the mandatory retirement age for Western Reserve faculty was 70 years. *See* Western Reserve University Faculty Handbook, Second Edition, January, 1964, p. 22, Joint Exhibit 4; Article IX, By-Laws, Adelbert College of Western Reserve University, 1926-1934, p. 13, Joint Exhibit 5.

On April 16, 1969, C.W.R.U.'s Board of Trustees, acting through its Executive Committee, adopted a resolution amending the retirement policy which lowered the mandatory retirement age. That resolution provided for the "beginning" of faculty members' retirement at age 65, subject to the following conditions and exceptions: (a) At age 65, the "beginning" of faculty retirement, contributions by the University to the individual's retirement annuity [pension program] would cease; (b) upon reaching age 65, the faculty member would have the option of continued appointment, either full time or part time, to age 68; (c) between the ages of 68 and 70 the faculty member could petition to be reappointed on a part or full time basis, and upon recommendation of the appropriate University

committees, could be reappointed for a one- or two-year period; and (d) appointments on an annual basis beyond age 70 could be initiated only by University committees. *See* Trial Court Findings of Fact, Paragraph 11; Joint Exhibit 13.

Dr. Rehor had attained age 68 by June 30, 1973, and was involuntarily retired by C.W.R.U. as of that date. Dr. Rehor's petition to be reappointed beyond age 68 was considered but not acted upon, thus constituting a denial of his petition.

On April 27, 1973, plaintiff appellant filed a complaint in Cuyahoga County Common Pleas Court for declaratory judgment, preliminary injunction, compensation for lost salary and pension fund benefits, and damages.

Defendant appellee's answer admitted plaintiff appellant's allegation that C.W.R.U., as a successor in interest to Western Reserve, assumed all of that predecessor institution's obligations to and contracts with faculty members.

This case came to trial before the court on July 26-27, 1973. The court made specific findings of fact and conclusions of law and thereafter entered judgment for defendant C.W.R.U. on December 28, 1973. Dr. Rehor appealed January 25, 1974 and has assigned as error that:

> "I. The Trial Court erred in its Conclusion of Law that the defendant could alter the terms of the employment contract between the plaintiff and the defendant by amending its retirement policy.
>
> "II. The Trial Court erred in its Conclusion of Law that plaintiff's retirement by defendant as of June 30, 1973, was in accord with, and not in breach of, the employment contract between plaintiff and defendant."

Appellant's two assignments of error will be considered together as both maintain that the trial court erred in ruling that appellee, in amending its retirement policy, did not breach appellant's employment contract. The issue before this court is whether C.W.R.U.'s action in lowering its mandatory retirement age from 70 to 68 years abridged the employment contract rights of Dr. Rehor, a full professor who had been tenured for over 25 years.

The trial court's conclusions of law read as follows:

> "1. Defendant's amended retirement policy, as stated in paragraph 11 of the foregoing Findings of Fact, was properly adopted by defendant and communicated to faculty members, including plaintiff, and was within the lawful power of defendant.
>
> "2. Plaintiff's employment contract with defendant incorporated as part of its terms defendant's amended retirement policy as it pertained to plaintiff.
>
> "3. The incorporation of defendant's amended retirement policy into the employment contract between plaintiff and defendant was supported by adequate consideration.
>
> "4. Plaintiff's retirement by defendant as of June 30, 1973 was in accord with, and not in breach of, the employment contract between plaintiff and defendant."

As a full professor with tenure appellant was entitled to continued employment, that is, annual reappointment until his death or retirement, unless sufficient cause was shown for his termination. Appellant's annual reappointments for the last 16 years of his employment with Western Reserve and then C.W.R.U. were evidenced at trial by printed forms with pertinent information typed in spaces

provided and signed by the dean and the president, or the dean "with the authorization of the president." Joint Exhibits 1A to 1P. Appellant was described in these forms first as a professor "without term," and later as having "tenure status: already established." In *Perry v. Sindermann* (1972), 408 U.S. 593, 601-602, a case involving the termination of a tenured university professor, the United States Supreme Court reasoned that:

> A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing may be 'implied.' 3 A. Corbin on Contracts §§561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' Id., at §562. And, '[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past.' Ibid.

In order to define the scope of appellant's protected interests it is first necessary to more fully understand the concept of university faculty tenure.

The most widely accepted statement of academic tenure, that of the Association of American Colleges and the American Association of University Professors, provides:

> *"Academic Tenure*
>
> "(a) After the expiration of a probationary period teachers or investigators should have permanent or continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.
>
> "In the interpretation of this principle it is understood that the following represents acceptable academic practice:
>
> "(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated. * * *" *1940 Statement of Principles on Academic Freedom and Tenure,* 44 AM. ASS'N U.P. BULL. 290-293 (Spring, 1958).

The essential characteristic of tenure is continuity of service, in that the institution in which the teacher serves has in some respect, either as a legal obligation or as a moral commitment, relinquished the power it otherwise would possess to terminate the teacher's services. Academic freedom and tenure have been analogized to federal judicial freedom and tenure, derived from the provision of Article III, Section 1, the United States Constitution: "The Judges, both of the supreme and inferior courts, shall hold their Offices during good behavior, and shall, at stated Times, receive for their services, a Compensation which shall not be diminished during their continuance in office." *See* C. BYSE & L. JOUGHIN, TENURE IN AMERICAN HIGHER EDUCATION 2-4 (1959).

Academic tenure, unlike federal judicial appointment, does not invoke a lifetime employment relation between the university and the tenured professor. A formal grant

of academic tenure does, however, create a legitimate and objective expectancy of continued employment and a protected property interest with the other terms of a tenured professor's contract with a university. *Cf. Perry v. Sindermann, supra,* at 602-603.

The terms of Dr. Rehor's contract with C.W.R.U. and Western Reserve were not contained in any single instrument. Instead, C.W.R.U. used the common practice of tendering annual reappointment forms which contained certain terms of Dr. Rehor's employment contract such as salary, rank, and tenure status,[1] and the parties have admitted further that the rules, regulations, and policies of the university, as contained in the 1964 Western Reserve Faculty Handbook, were also part of appellant's contract with appellee. There is extensive authority in accord with the proposition that university rules, regulations, bylaws, and policies become implied terms of faculty employment contracts and thereby give rise to protectable rights. *See Perry v. Sindermann, supra,* at 601-602; *Zimmerer v. Spencer* (5th Cir., 1973), 485 F.2d 176, 178; *Greene v. Howard University* (D.C. Cir., 1969), 412 F.2d 1128, 1135; *Downs v. Conway School Dist.* (E.D. Ark., 1971), 328 F.Supp. 338, 348-349; *Zimmerman v. Minot State College* (N. D. 1972), 198 N.W. 2d 108, 114; *Hillis v. Meister* (1971), 82 N.M. 474, 483 P.2d 1314; *see also* C. BYSE & L. JOUGHIN, *supra* at 82-84.

The 1964 Western Reserve Faculty Handbook, at pages 20, 22 contains the following provisions pertinent to this case:

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1. In the academic years beginning in 1957 through 1965, Western Reserve had printed on its standard faculty reappointment forms: "This sheet, when signed by the President, constitutes a contract of employment between Western Reserve University and the appointee." Joint Exhibits 1A to 1I. Thereafter, in the academic years beginning in 1966 through 1972, Western Reserve and then C.W.R.U. simply termed the standard form ". . . a reaffirmation of appointment and statement of compensatnon [for tenured faculty]" or ". . . a statement of continuing appointment or reappointment." Joint Exhibits 1J to 1P.

"APPOINTMENT, TENURE, AND SEPARATION

"WESTERN RESERVE UNIVERSITY

"EXCERPT FROM THE BY-LAWS OF THE BOARD OF TRUSTEES

"*Article VI—Appointments and Tenure*

> "The Board of Trustees shall from time to time adopt such rules and regulations governing the appointment and tenure of members of the several Faculties as said Board deems necessary.

"On May 4, 1961, the Board of Trustees adopted the following statement which had been recommended to the President by an ad hoc committee of full professors representing the several Faculties:

"A STATEMENT OF PRINCIPLES FOR APPOINTMENT, TENURE, AND SEPARATION FOR THE GUIDANCE OF THE FACULTIES

> "A faculty member shall have academic freedom and tenure in accordance with the current statement of principles as approved jointly by the American Association of University Professors and the Association of American Colleges.

"I. *Appointments*

"1. Appointments to the ranks of Professor, Associate Professor, Assistant Professor, and Instructor shall be made by the Board of Trustees for a specified period of time or with tenure.

• • •

"IV. *Retirement*

"1. It is provided, however, that the services of all members of all Faculties shall automatically terminate on June thirtieth following the date upon which they reach the age of seventy years, or upon their seventieth birthday if that falls on June 30, ..."

The term of the contract at issue in this case is the duration or length of appellant's employment. Appellant maintains that he had a vested right to employment up to a mandatory retirement age of 70, on the basis of section IV, *Retirement*, of the bylaws, *supra*. Appellee maintains that appellant had no such right, but rather that it retained the power to amend, that is, to lower the mandatory retirement age for faculty by virtue of Article VI, *Appointments and Tenure, supra*. Appellee further argues that appellant was apprised of the action of its Board of Trustees in lowering the retirement age and, with this knowledge, accepted further employment with appellee and thereby agreed to be bound by the new policy. Both arguments are without merit. As there are so few reported decisions involving the contractual rights of tenured private university professors we shall look to cases from the public sector for guidance in deciding this appeal.

In decisions involving teachers employed at public institutions pursuant to teachers' tenure acts, the courts have construed the tenure provisions in such statutes as granting the teacher a vested contractual right to continuing, permanent employment, and have further construed any subsequent statute, administrative rule or regulation which effected the teacher's termination or involuntary retirement contrary to the terms provided in the original employment contract as constituting an unlawful impairment of contract.

In *Hillis v. Meister, supra*, the Court of Appeals of New Mexico held that the course of conduct between the faculty member and the university made the provisions in the faculty handbook part of the plaintiff teacher's employment contract with the university. The *Hillis* court further held that the university's failure to follow the procedures set forth in the faculty handbook concerning the treatment of plaintiff, as a first year faculty member whose employment was terminated, constituted a breach of the employment contract by the university thereby entitling plaintiff teacher to damages. 82 N.M. at 477.

In *Zimmerman v. Minot State College, supra*, the Supreme Court of North Dakota held that where the faculty handbook was part of the contract between the college and the teacher, a termination of that teacher's services not in accordance with the express provisions of that handbook constituted a breach of contract entitling such teacher to damages in the amount of her net annual salary loss. 198 N.W.2d at 114. The *Zimmerman* court resolved in plaintiff's favor inconsistencies in the empowering statutes under which the State Board of Higher Education acted in promulgating its Policy Statement included in the faculty handbook and held that the express provision in the faculty handbook on which plaintiff relied was an enforceable term of the employment contract. *Id.*

In *Indiana, ex rel. Anderson, v. Brand* (1938), 303 U.S. 95, the United States Supreme Court interpreted the Indiana Teachers' Tenure Act as creating a valid contractual obligation between the teacher and the school corporation which "provided that a teacher who has served under contract for five or more successive years, and thereafter enters into a contract for further service with the school corporation, shall become a permanent teacher and the contract, upon the expiration of its stated term, shall be deemed

to continue in effect for an indefinite period, shall be known as an indefinite contract, and shall remain in force unless succeeded by a new contract or cancelled as provided in the Act." 303 U.S. at 101-102. The Supreme Court in *Anderson* held that a subsequent amendment to the Indiana Teachers' Tenure Act that removed the petitioner, as a township school teacher, from the permanent and indefinite provision of the Tenure Act thereby permitting her summary termination, constituted an impairment of a valid contractual obligation. 303 U.S. at 104.

In *Montana, ex rel. Keeney, v. Ayers* (1939), 108 Mont. 547, 92 P.2d 306, the Montana Supreme Court held that regulations of the state board of education incorporated into a university professor's employment contract by reference and reprinted on the reverse side of his annual reappointment form had the force and effect of statutes. The *Keeney* court further held that the contract could not be modified by striking out certain provisions on the reverse side of the annual form for a subsequent year after such professor had attained tenure status under the regulations and that his acceptance of continued employment after one such provision had been stricken from his annual reappointment form did not operate as a waiver of his right to claim permanent status or otherwise change his status as a tenured, permanent professor with explicit and vested contractual rights. 108 Mont. at 554-556.

In *State, ex rel. Creig, v. Board of Education of City of Cleveland, et al.* (1942), 139 Ohio St. 427, the Ohio Supreme Court held that a Cleveland Board of Education rule denying employment to teachers who had reached the age of sixty-five years cannot override the express provision of the Teachers' Tenure Act that qualifying teachers are to be employed until they reach seventy years of age. The court in *Creig* stated that "[u]nder Section

7690-1, General Code, a continuing contract available to a certificated teacher shall remain 'in full force and effect until the teacher resigns, elects to retire, or is retired pursuant to Section 7896-34 of the General Code, or until it is terminated or suspended as provided in this act * * *.' Under Section 7896-34, General Code, a teacher cannot be compelled to retire until he or she becomes seventy years old." 139 Ohio St. at 443. The court in *Creig* therefore held that the board of education was without authority to deny Mr. Creig a continuing contract on the basis that he had reached the age of sixty-five years. *Id.*

In *Sylvestre v. Minnesota, et al.* (Minn. 1973), 214 N.W.2d 658, six retired judges brought declaratory judgment actions to declare 1967 and 1969 amendments to the judges' retirement statute unconstitutional as applied to them on the ground that their contract rights had been impaired. Two of the judges had retired after both amendments had been enacted, which changed retirement compensation from one-half the salary "allotted to the office" to one-half the salary "allotted to the office at the time of his retirement (or on July 1, 1967, whichever is greater)." 214 N.W.2d at 660. Judicial salaries had been raised in Minnesota and the effect of the amendments was to freeze retirement compensation at the 1967 level rather than to allow it to increase as currently serving judges' salaries increased.

The Minnesota Supreme Court in *Sylvestre* ruled in favor of all six judges, including the two who had retired after the effective date of the amendments, and held the state had unilaterally offered these judges retirement compensation of one-half of the salaries allotted to the office, based on the terms of the original legislation effective at the time they took office, and that their part performance

by serving as judges made that offer irrevocable and a binding term of their contract of employment.

The *Sylvestre* court, referring to the appeals of Judges Flynn and Underhill who retired after the amendments, reasoned that "[u]nder the Restatement view, part performance by the offeree prevents the revocation of the offer (Restatement, Contracts, 45):

"'If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer.[2] A change in the terms of the offer which reduces the terms of the original offer is, of course, tantamount to a revocation of the offer and the substitution of a new offer.

"Thus, following the analogy to private employment cases, once Judges Flynn and Underhill began their service as judges, the state was bound by a contract to pay 'one-half the compensation allotted to the office' in retirement benefits, although of course the state's duty of immediate performance did not arise until the judge's completion of the requisite years of service." 214 N.W.2d at 667-668. The Minnesota Supreme Court therefore ruled that the statutory amendments unconstitutionally impaired all six

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2. "Under Restatement, Contracts 2d, Tentative Draft, §45, the same principle is retained although beginning performance is said to create an option contract: '(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.'

"An option contract is of course irrevocable." 214 N.W.2d at 667, n.4.

judges' contracts based on the offer contained in the original legislation at the time all six took office.

The present appeal, however, involves contracting parties in the private rather than public sector and academic rather than judicial tenure. The contract terms at issue in this case include the statement in the faculty handbook that faculty members shall have academic freedom and tenure in accordance with the current principles of the American Association of University Professors, the general provision that appellee's "Board of Trustees shall from time to time adopt such rules and regulations governing the appointment and tenure [of faculty members as it] deems necessary," and the specific provision that the mandatory retirement age for faculty is 70 years.

The empowering provision under which appellee maintains its Board of Trustees could amend and lower the faculty retirement policy simply deals with rule-making power over appointment and tenure generally. The provision as to mandatory retirement age, however, was clear and unambiguous in explicitly setting forth that Western Reserve faculty would be employed to age 70 years. Where there are general and express provisions in a contract relating to the same thing, the express provisions control. *Freeland v. Freeland, et al.* (6th Cir., 1940), 110 F.2d 966, 968. We therefore conclude that the express provision as to mandatory retirement age controls over the general rule-making provision.

A recent decision from the Supreme Court of Iowa held that a professor at a private college was entitled to damages for the breach of the express terms of his employment contract, which terms included the grant of tenure. In *Collins v. Parsons College* (Iowa 1973), 203 N.W. 2d 594, Professor Collins was hired by Parsons Col-

lege in 1966 at an annual salary of $25,000, placed on tenure, and given a written promise of $1,000 annual salary raises to 1971 when he would be paid $30,000. The faculty bylaws were incorporated into the contract by reference. Professor Collins was employed by Parsons under annual contract forms for two academic years when he was tendered a contract form in the third year for $15,000, which he refused to sign. The college refused to honor the original agreement and then notified Collins he was no longer employed. 203 N.W.2d at 596.

In construing the terms of Collins' employment contract with Parsons, the Iowa Supreme Court held that the specific tenure provisions granted the professor permanent employment (at the stipulated salary and raises for the first five years) which was not terminable at the will of the college, but only for just cause on written charges before the tenured faculty according to the bylaws. 203 N.W.2d at 597-598. The court resolved the lack of mutuality issue on the rationale that Collins had given up a position at a Wisconsin State University to come to Parsons but further reasoned that agreements for academic tenure do not require mutuality, as in the case of unilateral contracts. The *Collins* court thus stated:

> "We have considerable doubt that an agreement for tenure such as this one requires mutuality in any event, *as to duration of the employment.* Tenured teachers in institutions of higher learning have permanent positions as spelled out in the bylaws of their institutions, just as civil servants have permanent positions as spelled out in statutes." 203 N.W.2d at 598. (Emphasis in original.)

From the time appellant joined the Western Reserve faculty through the time he was granted tenure for a

period of 40 years, his contract, as contained in the bylaws, stated that he would be required to retire at age 70. Appellee assumed appellant's contract as a tenured professor with a right to continuing reappointment incident to the 1967 Case Institute—Western Reserve federation. Thereafter, in 1969 appellee altered the term of the duration of appellant's employment contract by lowering his mandatory retirement age from 70 to 68 years.

We hold that appellee made an offer for a unilateral contract at the time appellant began performance with appellee, the specific terms at issue being that once appellant qualified for and was granted tenure he would be employed continuously to a mandatory retirement age of 70 subject to termination for cause. The original Western Reserve retirement policy was incorporated in and became a term of appellant's contract when he was granted tenure, and this obligation was assumed by appellee.

The principles of the law of contracts and the judicial recognition of the concept of academic tenure developed in the authorities cited above persuade this court to conclude that appellee abridged appellant's vested contract rights when it unilaterally lowered appellant's mandatory retirement age, without appellant's assent and without consideration. As a result, Dr. Rehor was involuntarily retired two years prior to the express provision of his employment contract and has been denied a property right in the form of a justified, objective expectancy of continuous employment to age 70. *Cf. Perry v. Sindermann, supra.*

We therefore sustain appellant's assignments of error and conclude that the trial court erred in ruling that it was within appellee's lawful power to amend its retirement policy and thereby lower appellant's mandatory retirement age.

Appellant is entitled to damages in an amount not less than his net annual salary loss for the last two years of his contractual term. See *Poehls v. Young et al., Board of Education* (1945), 144 Ohio St. 604; *Roller v. Patrick et al., Board of Education* (1945), 145 Ohio St. 572; *Long v. Board of Education* (1962), 116 Ohio App. 263. See also *Collins v. Parsons College, supra.*

We therefore reverse the judgment below, enter final judgment for plaintiff-appellant and against defendant-appellee, and remand this action for further proceedings on the computation of damages.

Judgment reversed.

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS

(Filed August 5, 1974)

This cause came on to be heard upon the pleadings and the exhibits and transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the Court and upon review the following disposition made: judgment reversed. See Opinion incorporated by reference and made part of this Journal Entry.

APPENDIX

FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY THE COURT OF COMMON PLEAS

This cause came on for trial and the court having heard the evidence and considered the stipulation of the parties, and the plaintiff having filed a request for separate findings and conclusions on the general findings theretofore made, therefore finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. Defendant Case Western Reserve University is an institution of higher learning organized and existing since July 1, 1967 as a corporation not for profit under the laws of the State of Ohio. Defendant is a successor institution to Case Institute of Technology and Western Reserve University, both formerly institutions of higher learning organized as corporations not for profit under the laws of the State of Ohio.

2. Cleveland College was an institution of higher education prior to 1929. In 1942, Cleveland College became part of Western Reserve University.

3. Plaintiff commenced employment at Cleveland College in 1929, teaching primarily in the fields of English and Journalism. From 1942 through June 30, 1967 plaintiff was employed under contract as a professor at Western Reserve University, and plaintiff continued under contract as a professor of defendant after June 30, 1967.

4. Plaintiff was granted tenure by Western Reserve University prior to 1948.

5. At all times during which plaintiff was a faculty member at Western Reserve University the retirement age there was 70 years of age.

6. Faculty employment contracts of defendant, and of former Western Reserve University, incorporated as part of their terms the University's policies, rules and regulations which applied to the faculty member, including the University's retirement policy.

7. Western Reserve University's employment policy prior to its becoming part of plaintiff specifically reserved the right in that University's Board of Trustees to amend that University's employment policy.

8. Defendant assumed the employment contracts between former Western Reserve University and its faculty members, including that with plaintiff.

9. Upon the federation of Western Reserve University and Case Institute of Technology, defendant started the review of the separate policies, rules and regulations of the two former institutions and the adoption of uniform policies, rules and regulations for defendant, its faculty, students and administration.

10. Two faculty committees of defendant reviewed the separate retirement policies of the two former institutions and recommended a uniform retirement policy. Notice of the activities of these committees was given to faculty members and at least one public hearing for faculty members was held.

11. On April 16, 1969 defendant's Board of Trustees, duly acting through its Executive Committee, adopted a Resolution amending defendant's retirement policy. That Resolution provided that retirement of all faculty members was to be at age 65, subject to the following: (a) at age 65, the beginning of faculty retirement, contributions by the University to its retirement pension program for the faculty member's account would end; (b) upon reaching age 65, the faculty member would have the option of continued

appointment, either full time or part time, to age 68; (c) between the ages of 68 and 70 the faculty member could petition to be reappointed on a part time or full time basis, and upon recommendation of the appropriate University committees, could be reappointed for a one or two year period; and (d) appointments on an annual basis beyond age 70 could be initiated only by University committees.

12. Plaintiff attained 68 years of age before June 30, 1973 and was retired by defendant as of June 30, 1973 pursuant to the amended retirement policy stated in paragraph 11 above.

13. The amended retirement policy as stated in paragraph 11 above was communicated by defendant to all faculty members, including plaintiff, in writing at least by April 6, 1970.

14. Plaintiff was specifically advised in writing by defendant at least by July 2, 1970 that his retirement would be on June 30, 1973.

15. On July 2, 1969, plaintiff executed his annual appointment contract for the year 1969-1970; on July 6, 1970, plaintiff signed his annual contract for the year 1970-71; and on May 6, 1971, plaintiff executed his contract for the year 1971-72. Each contract provided for an increase in Professor Rehor's salary.

16. Pursuant to the terms of defendant's amended retirement policy as stated in paragraph 11 above plaintiff petitioned the appropriate University faculty committee for a recommendation that he be reappointed beyond age 68. After committee consideration, no action was taken on the petition.

17. Plaintiff petitioned the President of defendant by letter of July 19, 1971 for reappointment beyond age 68. This petition was denied in writing on September 22, 1971.

CONCLUSIONS OF LAW

1. Defendant's amended retirement policy, as stated in paragraph 11 of the foregoing Findings of Fact, was properly adopted by defendant and communicated to faculty members, including plaintiff, and was within the lawful power of defendant.

2. Plaintiff's employment contract with defendant incorporated as part of its terms defendant's amended retirement policy as it pertained to plaintiff.

3. The incorporation of defendant's amended retirement policy into the employment contract between plaintiff and defendant was supported by adequate consideration.

4. Plaintiff's retirement by defendant as of June 30, 1973 was in accord with, and not in breach of, the employment contract between plaintiff and defendant.

IT IS SO ORDERED, and counsel for defendant will submit appropriate judgment in accordance.

APPENDIX

THE CONSTITUTION OF THE UNITED STATES

Article I

Section 10. No State Shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of A Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility . . .

Article IV

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use; without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX

Excerpt from 1964 Faculty Handbook

* * * * *

APPOINTMENT, TENURE, AND SEPARATION

WESTERN RESERVE UNIVERSITY

EXCERPT FROM THE BY-LAWS OF THE BOARD OF TRUSTEES

Article VI—Appointments and Tenure

The Board of Trustees shall from time to time adopt such rules and regulations governing the appointment and tenure of members of the several Faculties as said Board deems necessary.

On May 4, 1961, the Board of Trustees adopted the following statement which had been recommended to the President by an ad hoc committee of full professors representing the several Faculties:

A STATEMENT OF PRINCIPLES FOR APPOINTMENT, TENURE, AND SEPARATION FOR THE GUIDANCE OF THE FACULTIES

A faculty member shall have academic freedom and tenure in accordance with the current statement of principles as approved jointly by the American Association of University Professors and the Association of American Colleges.

I. *Appointments*

1. Appointments to the ranks of Professor, Associate Professor, Assistant Professor, and Instructor shall be made by the Board of Trustees for a specified period of time or with tenure.

2. Appointments to each Faculty shall be made by the Board of Trustees on nomination from the Faculty concerned, with the concurrence of the President. The nominations in every case shall be made after consultation between the President and the Dean of the Faculty concerned.

3. Recommendations for appointments shall be made on the basis of complete information regarding the candidate's fitness for the position. A clear statement of the terms on which the appointment is made and accepted (indicating inter-faculty rights and duties if any) shall be transmitted to the appointee by the President or a person designated by him. The terms of the appointment shall be placed in writing.

4. Notice of intent to reappoint or not to reappoint to a Faculty at the end of term for a specified number of years shall be given in writing to the individual not less than six (6) months before the expiration of an appointment for more than one year, and not less than three (3) months before the expiration of an appointment for one year. Such notice shall be given by the Dean of the appropriate Faculty.

II. *Probationary Period*

1. The probationary period is defined as that period between the person's first appointment as a member of a Faculty with at least the rank of instructor and his appointment with tenure.

2. The probationary period should not extend beyond seven years, although it may be extended for legitimate reasons upon recommendation of the appropriate Faculty, concurrence of the President, and approval of the Board of Trustees. If, at the end of

seven years, the individual is recommended for reappointment but not with tenure, the Dean of the appropriate Faculty shall give him an explanation in writing.

III. *Termination*

1. Separation during Appointment with Tenure

(a) A Trustee appointed member of a Faculty (excluding clinical appointees) with tenure, except in cases of extraordinary circumstances because of financial exigencies, shall not be removed save for cause.

(b) The President, or an officer designated by him, shall prepare an explanatory statement for the action taken. The recommendation of a person's separation from a Faculty during his appointment with tenure shall be the responsibility of the appropriate Faculty.

(c) Written notice of such termination, stating in explicit terms the cause of termination, shall be delivered to such appointee not less than one year before the termination of his services. Unless said written notice shall state that termination was made only under extraordinary circumstances because of financial exigencies, such termination shall not become final until after a hearing, if requested, before the Board of Trustees sitting jointly with a committee appointed by the Faculty concerned, unless these two groups shall unanimously agree that it is in the best interest of the University not to hold such a hearing.

2. Separation during Appointment for a Specified Period of Time

Appointments of Professors, Associate Professors, Assistant Professors and Instructors for a specified period of time may be terminated by the Board of Trustees before the expiration thereof for cause. Written notice of such termination, stating in explicit terms the cause of termination, shall be delivered to the individual concerned six (6) months before the termination of his services if his appointment has been in effect for a period of less than two years; and at least twelve (12) months before the expiration of an appointment after more than two years in the institution. Unless said written notice shall state that termination was made only under extraordinary circumstances because of financial exigencies, such termination shall not become final until after a hearing, if requested, before the Board of Trustees sitting jointly with a committee appointed by the Faculty concerned, unless these two groups shall unanimously agree that it is in the best interest of the University not to hold such a hearing.

IV. *Retirement*

1. It is provided, however, that the services of all members of all Faculties shall automatically terminate on June thirtieth following the date upon which they reach the age of seventy years, or upon their seventieth birthday if that falls on June 30, excepting that, in conformity with action heretofore had by the Faculty of the School of Medicine, the age of retirement of members of the teaching staff of the School of Medicine appointed on or after October 10, 1945, shall be sixty-five years.

• • • • •

APPENDIX

AMERICAN COUNCIL ON EDUCATION
ONE DUPONT CIRCLE
WASHINGTON, D.C. 20036

October 16, 1974

OFFICE OF THE PRESIDENT

The Supreme Court of Ohio
Columbus, Ohio 43210

RE: Rehor v. Case Western University, on review from the Court of Appeals of Ohio for the Eighth District

Gentlemen:

On behalf of the American Council on Education, an association of 204 national and regional educational associations and of 1,377 institutions of higher education throughout the United States, I am writing to urge the Supreme Court of the State of Ohio to review the holding of the Eighth District of the Ohio Court of Appeals in this case.

Our association has carefully reviewed the facts in the Rehor case and the decisions of the Court of Common Pleas of Cuyahoga County and of the Court of Appeals. We believe the issues raised in the case are not unique to the parties in litigation, but are of broad interest and concern to all colleges and universities in the United States. The meaning of tenure and its implications is of extreme interest to the academic community, not only as it relates to the retirement of tenured faculty but also to all other conditions of employment of tenured faculty. To the best of our knowledge the case at bar is the first one to consider the issue of a change in a college's retirement policy as it relates to a tenured faculty member and will be important

precedent on this question nationally, and will be cited as precedent with respect to other questions involving the terms of employment of tenured faculty members.

In view of the great interest and importance this case will have to the college and university community, we respectively petition this honorable Court to grant review in Rehor v. Case Western Reserve University.

Very truly yours,

Roger W. Heyns

CLEVELAND COMMISSION ON
HIGHER EDUCATION

1367 East 6th St.
Cleveland, Ohio 44114
(216) 241-7583

Baldwin-Wallace College-Case Western Reserve University-Cleveland State University-Cuyahoga Community College Dyke College-John Carroll University Notre Dame College-Saint John College of Cleveland-Ursuline College

October 10, 1974

The Supreme Court
State of Ohio
State Office Building
Columbus, Ohio

Gentlemen:

Re: Rehor v. Case Western Reserve University

The Cleveland Commission on Higher Education is an Ohio nonprofit corporation whose trustees are the Presidents of the nine public and private universities in Greater Cleveland, together with nine private citizens interested in higher education. Our purpose is to improve opportunities for higher education in Greater Cleveland.

At a recent meeting of the Board of Trustees, the decision of the Court of Appeals for Cuyahoga County in the case of Rehor v. Case Western Reserve University was discussed. The trustees unanimously request that I write to you to express the strongly held view of the members of the Cleveland Commission on Higher Education that the

case is of the highest importance for the administration of both private and public universities and colleges, and to urge that The Supreme Court accept jurisdiction of it. In a time of declining enrollments it is of the greatest importance that wise determinations be made as to the power of the institution to alter its operating procedures, and as to the rights of members of the faculty and other employees to be protected from arbitrary procedures. The conflict between these two considerations is a real one, and the wise resolution of it will have profound significance for higher education throughout Ohio and the nation.

We respectfully urge the Court to accept jurisdiction.

Respectfully submitted,

Hugh Calkins

BALDWIN-WALLACE COLLEGE
Berea, Ohio 44017

OFFICE OF THE PRESIDENT

September 27, 1974

The Supreme Court of Ohio
Columbus, Ohio 43210

Gentlemen:

Baldwin-Wallace College is a private institution of higher learning located in Berea, Cuyahoga County, Ohio. Like most colleges and universities in the United States we have adopted a program of tenure for qualified members of our faculty.

The Court of Appeals of Cuyahoga County has recently rendered an opinion in a case entitled Rehor v. Case Western Reserve University involving the right of a tenured professor to teach until attainment of a certain retirement age. I understand that Case Western Reserve University is asking this Court to hear an appeal of that case and I am writing to urge you to accept jurisdiction of the matter. The importance of the issues raised in that case are not limited to the parties but are of great importance to Baldwin-Wallace College and to the entire academic community in the State of Ohio.

In ruling that Case Western Reserve University did not have the right to amend its retirement age from 70 to age 68 the Court of Appeals has put forth a definition of tenure which goes far beyond the academic community's understanding of the protections afforded by tenure.

That definition of tenure will not be restricted to changes in a retirement policy but will be equally applicable to many other terms of our employment contracts with tenured professors.

The issues presented in the case have not to the best of my knowledge been ruled upon by any other court in the country. Tenure is a very important aspect of the employment policies of virtually every college and university. It is important that the issues raised in the case be passed upon by the highest court in the State of Ohio. I urge you to accept jurisdiction of the case entitled Rehor v. Case Western Reserve University.

Sincerely,

A.B. Bonds, Jr.
President

ABB/jr

THE CLEVELAND STATE UNIVERSITY

Cleveland, Ohio 44115

OFFICE OF THE PRESIDENT (216) 687-3544

October 10, 1974

Honorable Justices
Supreme Court of the State of Ohio
Judiciary Building
Columbus, Ohio 43215

Re: Rehor v. Case Western Reserve University
Supreme Court Case No. 74-899

Gentlemen:

In the captioned litigation, Case Western Reserve University has requested this Court to certify the record and assume jurisdiction over its appeal from an adverse ruling by the Court of Appeals of the Eighth Appellate District.

In behalf of The Cleveland State University, I urgently request the Court in the exercise of its wisdom to assume the requested jurisdiction.

The legal issues raised by Case Western Reserve University in its memorandum in support of jurisdiction are of public and general interest in that they may have possible application to the contractual relationships of all private and public colleges and universities in the State of Ohio.

Therefore, the public interest will best be served by having this Court, as the highest

judicial tribunal in the State of Ohio, render its judgment in the case.

Respectfully submitted,

Walter B. Waetjen
President

WBW:dl

Supreme Court, U. S.
FILED
NOV 19 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975
No. 75-597

CHARLES F. REHOR,
Petitioner,

vs.

CASE WESTERN RESERVE UNIVERSITY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

JAMES I. HUSTON
SCHNEIDER, SMELTZ, HUSTON & BISSELL
1525 National City Bank Building
Cleveland, Ohio 44114
Counsel for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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Supreme Court of the United States

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BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Opinion of the Supreme Court of Ohio, set forth as Section A of the Appendix to the Petition, is reported at 43 Ohio St. 2d 224 (1975).

The unreported opinion of the Court of Appeals for the Eighth Appellate District of Ohio is set forth as Section B of the Appendix to the Petition.

The unreported Findings of Fact and Conclusions of Law of the Court of Common Pleas of Cuyahoga County, Ohio is set forth as Section C of the Appendix to the Petition.

COUNTERSTATEMENT OF JURISDICTION

This Court lacks jurisdiction as explained hereafter to grant this writ of certiorari under 28 U.S.C. § 1257(3).

COUNTERSTATEMENT OF THE CASE

This lawsuit is on contract and involves an interpretation of "tenure" as that term is used in employment contracts of colleges and universities. Petitioner Charles F. Rehor charged that respondent Case Western Reserve University acted improperly in retiring him at age 68 pursuant to the University's amended retirement policy. The trial court ruled in favor of respondent. The facts are not in serious dispute and are substantially as stated in the trial court's Findings of Fact and Conclusions of Law (See Appendix C to the Petition).

Respondent was organized on July 1, 1967 as successor to Case Institute of Technology and to Western Reserve University. Petitioner was employed under contracts as a professor at Western Reserve University and continued under contracts as a professor at respondent from July 1, 1967 to his retirement on June 30, 1973. Petitioner was granted tenure by Western Reserve University sometime prior to 1948. The retirement age at former Western Reserve University was 70 years of age.

Immediately upon its formation the respondent started a review of the separate policies, rules and regulations of the two former educational institutions, including their faculty retirement policies. In 1969, upon faculty recommendation, respondent amended its retirement policy by lowering the retirement age. Under respondent's amended retirement policy petitioner was to retire at age 68 rather than at age 70.

Petitioner was advised in writing at least by July 2, 1970 that his retirement would be on June 30, 1973. After being so informed petitioner signed three separate annual appointment contracts, each of which provided for an increase in salary over the prior year.

Petitioner attained 68 years of age and was retired as of June 30, 1973 under respondent's amended retirement policy. Prior to June 30, 1973 petitioner requested the appropriate University faculty committee for a recommendation that he be reappointed beyond age 68. After consideration no action was taken on that request by the committee. Also, before June 30, 1973, petitioner wrote the President of respondent University asking for reappointment beyond age 68; this request was denied.

Petitioner appealed the decision of the trial court and the Court of Appeals for the Eighth Appellate District of Ohio reversed (See Appendix B to the Petition). Respondent then requested the Supreme Court of Ohio to review the decision of the Court of Appeals because the case involved matters of general and public interest. Various educational organizations and institutions of higher education wrote letters advising the Supreme Court of Ohio of the importance of the questions presented (See Appendix F to the Petition).

The Supreme Court of Ohio accepted jurisdiction, and after briefing and oral argument reversed the decision of the Court of Appeals and entered judgment for respondent. In reaching its decision the Supreme Court of Ohio had the benefit of the parties' briefs and also three briefs amicus curiae—one in support of petitioner's position and two in support of respondent's position.

The Supreme Court of Ohio held:

1. Respondent's employment policies, rules and regulations became part of the employment contract between petitioner and respondent.

2. The grant of tenure to petitioner did not preclude respondent from thereafter making reasonable changes in its retirement age for all faculty members, including petitioner.

3. Respondent's by-laws reserved to it the right to change respondent's retirement policy.

4. The employment contract between the parties was amended by them in writing and supported by adequate consideration.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THERE IS NO JURISDICTION UNDER 28 U.S.C. § 1257 (3).

Petitioner asserts jurisdiction for his petition to this Court under 28 U.S.C. § 1257(3). That section provides jurisdiction if a "title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It will be shown below that this contract action involves no "title, right, privilege or immunity" secured by federal law. But there is a prior point—there is no jurisdiction under 28 U.S.C. § 1257(3) because petitioner never "specially set up or claimed" at any point in the courts below that any such "title, right, privilege or immunity" had been violated. This claim is made now by petitioner for the first time before this Court. As stated by Justice White:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

The Supreme Court of Ohio did not discuss the federal questions now alleged in the petition. This Court has held that when the highest state court fails to pass upon a fed-

eral question it is assumed the omission was due to want of proper presentation in the state courts. *Street v. New York*, 394 U.S. 576 (1969).

However, petitioner argues the alleged federal questions were presented to the Ohio courts on two occasions. First, petitioner says he raised the federal grounds by citing *Perry v. Sindermann*, 408 U.S. 593 (1972), in his Supplemental Trial Brief (Petition at p. 7). Petitioner cited *Perry v. Sindermann* and several other cases in his Supplemental Trial Brief for the principle that a faculty handbook becomes part of a university's employment contract with its faculty members. (Respondent, by the way, agreed with this principle throughout.) But the mere citation of *Perry v. Sindermann*, which involved freedom of speech and procedural due process and did not in any way on its facts resemble this case, does not satisfy the mandate of 28 U.S.C. § 1257(3) that any federally protected "title, right, privilege or immunity" be "specially set up or claimed."

Petitioner claims the federal question was raised, secondly, by the citation of *Perry v. Sindermann, supra,* and *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938) in the opinion of the Court of Appeals (Petition at pp. 7-9). As stated above, *Perry v. Sindermann* did not involve any federally protected rights relevant to petitioner's claim herein; nor did *Indiana ex rel. Anderson v. Brand*, which involved the repeal by a state legislature of a statute granting tenure to public school teachers. But of greater importance, the mere discussion of a federal question in the opinion of a state court will not satisfy the requirement of 28 U.S.C. § 1257(3) that the federal right alleged to be violated be "specially set up or claimed" by petitioner. *Howard v. Fleming*, 191 U.S. 126, 137 (1903) and *Osborne v. Clark*, 204 U.S. 565, 567-9 (1907).

Jurisdiction does not exist under 28 U.S.C. § 1257(3) because petitioner has not "specifically set up or claimed" in the Ohio courts any federal "title, right, privilege or immunity."

II. THE DECISION OF THE SUPREME COURT OF OHIO DID NOT INFRINGE UPON ANY FEDERALLY PROTECTED RIGHT OF PETITIONER.

Petitioner brought this suit claiming respondent had breached its contract with him. The trial court determined the terms of the contract and their meaning and found that respondent was not guilty of any breach. The Supreme Court of Ohio upheld the trial court's interpretation of the employment contract between the parties and also held that respondent had not breached its agreement with petitioner.

Petitioner now claims he has been deprived of rights secured under Article IV, Section 2 and under the Fifth and Fourteenth Amendments to the United States Constitution because in his view the Supreme Court of Ohio misinterpreted the contract. This is a novel, if not outlandish, position. This was a private contract not involving the State of Ohio in any way. Petitioner says the action of the Supreme Court of Ohio provides the requisite state action under the Fourteenth Amendment, citing *Shelley v. Kraemer*, 334 U.S. 1 (1948). This pushes *Shelley v. Kraemer* too far, for that case involved the protection of a fundamental right under our Constitution—the right to be free from racial discrimination. If the ruling of the Supreme Court of Ohio in this private contract case shall suffice as a violation of Fourteenth Amendment rights, then *every* private contract could be said to involve federal rights and *every* disappointed litigant in a private contract

case decided by a state court would have a right to seek redress in this Court.

It is conceivable, we suppose, that a state court's decision could so blatantly violate contractual rights that this Court would overturn the decision as being a denial of due process under the Fourteenth Amendment—similar to the way that the enforcement by a state court of a contract which blatantly violated a fundamental right was prevented by this Court in *Shelley v. Kraemer*. While such a result may be conceptually possible, petitioner cites no case, and respondent has found no case, which so holds.

Moreover, where is the error of the Supreme Court of Ohio rising to this level of judicial malfeasance? First, petitioner says the Supreme Court of Ohio was wrong in finding three annual salary increases of $500 each were adequate consideration to support a modification of the contract (Petition at p. 11). Surely a court can take a different view of the evidence than a litigant without being in bad faith.

Second, petitioner says the Supreme Court of Ohio "manifested a lack of appropriate concern for the facts of the case." (Petition at p. 9). That the Supreme Court of Ohio viewed the evidence differently than did petitioner is neither surprising nor is it proof of judicial wrongdoing. This same claim could be made by practically every litigant—successful as well as unsuccessful.

Third, petitioner says this case "was decided as a reaction to the alarm manifested by the university lobby" and that the Supreme Court of Ohio "manifested its desire to achieve its result no matter what the law may be and in spite of what the law may be." (Petition at p. 9).

This is an irresponsible accusation. Petitioner is saying that six of the seven justices of the Supreme Court of Ohio have violated their oaths of office—that they were pressured by and succumbed to the "university lobby." Where is there any basis for such a charge? Nowhere. That two briefs amicus curiae were filed in support of respondent's position while only one brief amicus curiae (of the American Association of University Professors) was filed in support of the position of petitioner does not substantiate petitioner's charge against the Supreme Court of Ohio.

In claiming a denial of federally protected rights, petitioner suggests that *Perry v. Sindermann, supra,* held tenure to be an absolute property right. This Court did not so hold. *Perry v. Sindermann* viewed tenure as a property right for the limited purpose of determining that procedural due process required that a holder of tenure at a state college be advised of the reasons for his termination. Far from being an absolute property right which the federal courts would always protect, this Court in *Perry v. Sindermann* acknowledged that tenure would not entitle a professor at a state college to continued employment but only to be advised of the reasons for his discharge.

Petitioner has not shown that his constitutional rights were violated by the Supreme Court of Ohio, and they were not.

III. THE DECISION OF THE SUPREME COURT OF OHIO DID NOT AND COULD NOT IMPAIR THE OBLIGATION OF THE PARTIES' CONTRACT.

Petitioner argues that the holding of the Supreme Court of Ohio impairs his contract with respondent in violation of Article I, Section 10 of the United States Constitution. This argument rests on the same three grounds petitioner asserts to support his Fourteenth Amendment argument. These grounds did not justify intervention by this Court under the Fourteenth Amendment, nor do they justify intervention under the contract clause of the Constitution.

But even before reaching its merits, this claim of petitioner cannot be entertained by this Court because there is no state action here as required by Article I, Section 10. As stated by this Court:

> "It has been settled by a long line of decisions that the provisions of § 10, article I, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation, and not by judgments of courts. The language—'No state shall . . . *pass any* . . . *law* impairing the obligation of contracts'—plainly requires such a conclusion." (Emphasis in original). *Tidal Oil Company v. Flanagan,* 263 U.S. 444, 451 (1924).

The judgment of the Supreme Court of Ohio *cannot* be an unconstitutional impairment of the parties' contract. *Tidal Oil Company v. Flanagan, supra; Barrows v. Jackson,* 346 U.S. 249, 260 (1953).

CONCLUSION

This Court has no jurisdiction to hear this matter because no federal right of petitioner is involved, and because none was claimed in the Ohio courts. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES I. HUSTON
SCHNEIDER, SMELTZ, HUSTON & BISSELL
1525 National City Bank Building
Cleveland, Ohio 44114
Counsel for Respondent